

Omar Abdi Abshir pleaded guilty to Child Molesting¹ as a class C felony and was sentenced to eight years in prison. Abshir challenges his sentence, presenting the following restated issues for review:

1. Did the trial court err in finding aggravating circumstances?
2. Was the sentence appropriate in view of Abshir's character and the nature of his offense?

We affirm.

The facts as admitted by Abshir at the guilty plea hearing are that on August 17, 2006, nineteen-year-old Abshir compelled R.N., a female younger than fourteen years of age, by force to submit to fondling with the intent to arouse R.N.'s or Abshir's sexual desires. R.N., eleven years old at the time, reported the incident to her mother, who in turn called police. The police detective in charge of the investigation requested that R.N. be interviewed at the Child Advocacy Center. A subsequent Affidavit of Probable Cause summarized the results of that interview as follows:

[R.N.] disclosed to the forensic interviewer that the defendant, Omar Abshir, grabbed her by her hand and forced her from the hallway into his apartment. The victim further disclosed, that the defendant then grabbed a knife from the kitchen and said to her, "If you don't want to die, get off your clothes." The victim advised that she removed her clothing and the defendant then asked her if she wanted to have sex with him. The victim advised that she said, "No!" and that the defendant then stated, "If you don't want sex with me, you'll die! The victim advised that the defendant then took off his clothes and then told her to lay down. The victim advised that she then ran into the bathroom to get away from the defendant. The victim stated that the defendant then pushed her down in the bathtub, got

¹ Ind. Code Ann. § 35-42-4-3 (West, PREMISE through 2007 1st Regular Sess.).

inside the tub with her, and fondled her “boobs” with his hands. The victim advised that when she told the defendant not to touch her that he again got the knife and told her to have sex with him. The victim advised that the defendant kissed her on the mouth, squeezed her boobs, straddled her legs with his legs, put his finger inside of her vagina and put his penis, which she called “goose” inside of her. The victim showed the forensic interviewer with dolls how the defendant sat on her legs, which prevented her from getting up out of the bathtub and leaving the defendant’s apartment.

Appellant’s Appendix at 79.

On August 23, 2006, Abshir was charged as follows: Count I – rape as a class A felony; Count II – criminal deviate conduct as a class A felony; Count III – child molesting as a class A felony (intercourse); Count IV – child molesting as a class A felony (sexual deviate conduct); Count V – child molesting as a class A felony (fondling); and Count VI – criminal confinement as a class C felony. A plea agreement was reached whereby Abshir would plead guilty to child molesting under Count V, which was reduced to a class C felony, and the State would dismiss the remaining charges. Sentencing was left to the trial court’s discretion.

The trial court accepted the agreement and conducted a sentencing hearing. The court found as mitigating circumstances that Abshir pleaded guilty and accepted responsibility for his actions, that he expressed remorse, and that he has no criminal history. The court found as aggravating circumstances (1) the nature and circumstances of the crime and (2) the impact of the crime upon the victim and her family. After finding that the aggravators outweighed the mitigators, the trial court imposed the maximum eight-year sentence.

Abshir challenges his sentence in two respects. He claims first that the trial court cited improper aggravators in supporting a sentence that exceeds the advisory sentence. Second, he claims the sentence is inappropriate in view of his character and the nature of the offense he committed.

We observe at the outset that when evaluating certain sentencing challenges pursuant to the advisory sentencing scheme under *Anglemeyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218, we first confirm that the trial court issued the required sentencing statement that included “reasonably detailed reasons or circumstances for imposing a particular sentence.” *Id.* at 491. Second, the reasons or omission of reasons given for choosing a sentence are subject to review on appeal for an abuse of discretion. *Anglemeyer v. State*, 868 N.E.2d 482. The weight given to particular aggravators or mitigators, however, is not subject to appellate review. *Id.* Finally, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). *Id.*

1.

Abshir complains that the trial court erred in citing the nature and circumstances of the crime as an aggravating factor.

The trial court did not include any elaboration on this aggravator. Thus, its meaning is not immediately apparent. The trial court could have been alluding to the prior allegations that Abshir armed himself with a knife and threatened to kill the victim, and that he penetrated the victim’s vagina digitally and with his penis. This is the version

of the incident that the victim related to personnel at the Child Advocacy Center, which was then relayed to police investigators and incorporated into the probable cause affidavit and, eventually, the presentence investigation report.² The problem is that the State ultimately dismissed all of the charges alleging deadly force and vaginal penetration, and charged Abshir only with fondling by force. The acts supporting that reduced charge are the only ones Abshir admitted committing, regardless of the fact that the probable cause affidavit was incorporated into the presentence investigation report and Abshir did not object to its accuracy. *See Ryle v. State*, 842 N.E.2d 320, 325 n.5 (Ind. 2005) (“using a defendant’s failure to object to a presentence report to establish an admission to the accuracy of the report implicates the defendant’s Fifth Amendment right against self-incrimination”), *cert. denied*, 127 S.Ct. 90 (2006). In short, Abshir did not admit (1) using a knife during the incident, (2) threatening to kill R.N, or (3) penetrating her vagina, and those facts were not found by a jury. Thus, the trial court could not use those as a basis for finding the nature and circumstances of the crime as an aggravator. We note, however, that Abshir did admit the allegations contained in Count V, which included the allegation that he accomplished the fondling by use of force. Force is not an element of class C felony child molesting. *See* I.C. § 35-42-4-3(b). Therefore, subject to

² We note that Abshir included in his appendix a copy of the presentence investigation report on white paper. We remind Abshir that Ind. Appellate Rule 9(J) requires that documents and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1), which includes presentence investigation reports, must be filed in accordance with Ind. Trial Rule 5(G). That rule provides that such documents must be tendered on light green paper or have a light green coversheet and be marked “Not for Public Access” or “Confidential”. Ind. Trial Rule 5(G)(1).

the above comments and limitations, the trial court did not err in finding the nature and circumstances of the crime, i.e., force, as an aggravating circumstance.

Abshir also contends the trial court erred in finding the impact of the crime upon the victim as an aggravating factor. “It is settled law that where ‘[t]here is nothing in the record to indicate that the impact on the families and victims in this case was different than the impact on families and victims which usually occur in such crimes,’ this separate aggravator is improper.” *McElroy v. State*, 865 N.E.2d 584, 590 (Ind. 2007) (quoting *Mitchem v. State*, 685 N.E.2d 671, 680 (Ind. 1997)). The impact on others may qualify as an aggravator only where the defendant’s actions “had an impact on other persons of a destructive nature that is not normally associated with the commission of the offense in question and this impact must be foreseeable to the defendant.” *Comer v. State*, 839 N.E.2d 721, 727 (Ind. Ct. App. 2005), *trans. denied*. We conclude that the trial court’s explanation justified this aggravating circumstance.

It is important to note here that Abshir, the victim, and their families were members of a Somali Bantu sub-community that immigrated to Fort Wayne in 2004. Lynne Doctor has served as a family advocate for both families since their arrival in Fort Wayne. She wrote a letter to the trial court explaining the effect on the families and the entire Bantu community of Abshir’s crime and subsequent prosecution. Much of the information provided by Doctor was reinforced by letters written to the trial court by R.N.’s mother. Those letters were the source of the trial court’s explanation of this aggravator at sentencing. We reproduce the relevant comments here:

And what I mean by that Mr. Abshir is, you come from a culture and a country very different then [sic] our own. As indicated in all of the letters that I have received from the family of the victim, you and the victim, the families, share the same culture and the same religion. And in sharing that culture and religion, *you know the consequences of sexual conduct outside of a marriage. And you knew that if you had sexual contact with this young lady, she has disgraced her family.* And in that context, I consider the nature of the crime and your character as having a profound impact on this young lady and her family. And I say profound impact, based on what has been told to me in these letters that I received from her family and others in the community of that family. Her parents have told me that when you hurt their daughter and were taken to jail, no one speaks to them for a very long time. People are angry and say it's wrong for [the victim's family] to call 9-1-1. And it's wrong for the American friends to help the police. ... They tell me that [the victim] is not safe with you and they are no longer welcome to share everything with [their] [Bantu] community. ... The parents tell me that in [their] religion, [Abshir's] actions mean that [R.N.] and her family have been shamed. His actions mean that he has already killed [R.N.], but she lives. No one is angry before [Abshir] hurt [R.N.], now no one speaks, others talk about [the victim's family] and [they] are sometimes afraid. ... This morning I received a letter from a social worker who has assisted refugees coming to this city for thirty years. And that experience tells him and tells me that her family has experienced a powerful shunning, intimidation and pressure as a result of the completely appropriate call to 9-1-1 in this incident. I say all of this to you, Mr. Abshir, so that you understand the extraordinary impact that your behavior has had on this child and her family. And it's an impact that goes well beyond . . . [w]hat is normally associated with a Class C felony.

Appellant's Appendix at 135-37 (emphasis supplied).

The trial court's thoughtful comments plainly describe the cultural mores and dynamics by which R.N. and her family were threatened, isolated, and ostracized in their Bantu community by virtue of Abshir's sexual attack upon R.N. Moreover, we agree with the trial court that Abshir, who was nineteen years old at the time of the attack, would have known the impact his molestation would have upon R.N. and her family in

the Bantu community. In other words, the sexual assault upon R.N. had an impact on her and her family of a destructive nature that is not normally associated with the commission of child molesting and that impact was foreseeable to Abshir. *Comer v. State*, 839 N.E.2d 721. The trial court did not err in finding this as an aggravating factor.

2

Abshir challenges the appropriateness of his sentence. We have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). "We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*.

According to the presentence investigation report, Abshir has no criminal history, which is of moderate weight. His expression of remorse and the fact that he pleaded guilty are entitled to minimal weight. Balanced against these low-to-moderate mitigating circumstances are the details of the offense and the effect of his crime upon R.N. and her family. Abshir, a nineteen-year-old man, forcibly pulled eleven-year-old R.N. into his apartment, forced her to disrobe, and fondled her. He did this knowing that as a member of the Bantu community, R.N. would be forever stigmatized by the sexual nature of the attack upon her, notwithstanding that she was an entirely unwilling victim and, as a mere

child, unequipped to resist Abshir's forceful criminal sexual assault. In view of this incident and Abshir's character, an eight-year sentence is appropriate.

Judgment affirmed.

MATHIAS, J., and ROBB, J., concur.